



December 20, 2006

Ms. Deborah Jordan
Associate Director, Air Division
U.S. Environmental Protection Agency
75 Hawthorne St.
San Francisco, CA 94105

VIA EMAIL AND U.S. MAIL

**RE: Ventura County APCD Position Regarding Applicability of Rule 26 To The
Cabrillo Port Liquefied Natural Gas Deepwater Port**

Dear Ms. Jordan:

This letter is submitted by the Environmental Defense Center (“EDC”) on behalf of our client, the California Coastal Protection Network (“CCPN”). CCPN is a California public benefit corporation, dedicated to the protection of the California coast through education, research, and empowerment of public citizens. CCPN is headquartered in Santa Barbara, California and represents members throughout the State, including Santa Barbara, Ventura, and Los Angeles Counties. EDC is a non-profit public interest law firm that represents community organizations in environmental matters affecting California’s southern coast.

As you know, on November 14, 2006, the Ventura County Air Pollution Control District (“VC APCD” or “District”) submitted a letter to EPA explaining its position that the District’s Rule 26.2 applies to the Cabrillo Port Liquefied Natural Gas Deepwater Port (“Cabrillo Port”). Compliance with Rule 26.2 would compel BHP Billiton (“BHPB”) to equip the Cabrillo Port with best available control technology (“BACT”) and to obtain offsets to compensate for the Cabrillo Port’s significant air quality impacts. Unhappy with the prospect of having to conform to these stringent requirements, BHPB submitted a letter to EPA dated November 28, 2006 criticizing the District for asserting its position regarding the application of its own rules, disputing the validity of the District’s interpretation of its own rules, and arguing that the Cabrillo Port will not significantly impact air quality. BHPB is wrong on all counts.

I. It Is Appropriate For VC APCD To Advise EPA Regarding The Applicability Of VC APCD Rules To The Cabrillo Port

In its November 14 letter, the District advises EPA that:

Based on APCD staff's and legal counsel's thorough review of EPA's Statement of Basis, comments received by EPA during the public comment period for this proposed CAA Permit, and a reevaluation of the applicability of APCD Rule 26 . . . APCD staff have now determined that APCD Rule 26.2 does apply to the Cabrillo Port project and that the exemption in Rule 26.3.A.2. does not apply."

BHPB attempts to undercut the VC APCD's statements by arguing that the District lacks authority under the Deepwater Port Act ("DPA") to speak to the interpretation of its own rules. Contrary to BHPB's assertions, the District letter fits well within the framework of the DPA, which explicitly preserves the right of a state near a deepwater port to protect its environment. Specifically:

It is declared to be the purposes of the Congress in this Act to . . . provide for the protection of the marine and coastal environment to prevent or minimize any adverse impact which might occur as a consequence of the development of such ports . . . [and to] protect the rights and responsibilities of States and communities to regulate growth, determine land use, and otherwise protect the environment in accordance with law.

33 U.S.C. § 1501(a)(2) and (4). To further these purposes, the DPA requires compliance with the laws of the "nearest adjacent coastal state." 33 U.S.C. § 1518. EPA has identified California as the "nearest adjacent coastal state," and it has particularly identified the VC APCD rules as the air quality requirements that are applicable to the Cabrillo Port. EPA Statement of Basis at 11-12. It is, thus, entirely appropriate for the District – the entity responsible for promulgating and implementing these rules – to articulate its position in this matter. Furthermore, with its emphasis on protecting the rights and responsibilities of states, the DPA dictates that this position must be given due consideration by EPA.

The VC APCD is not, as BHPB puts it, questioning EPA's lead role in issuing a permit, nor is the District attempting to assert any "special authority under the DPA." The District's November 14, 2006 letter is simply its latest statement in a series of discussions between EPA and VC APCD regarding the air quality requirements applicable to the Cabrillo Port. Notably, BHPB apparently had no complaint against the District's participation in these permit discussions until the District took a position with which BHPB disagrees. BHPB attempts to couch its concern with the District's position as a "due process" problem, but this does not disguise the fact that its true concern is with having to comply with the rigorous air quality requirements of Rule 26.2. As we

described in our August 2, 2006 comment letter to EPA regarding the proposed air permit, BHPB has engaged in an all out effort to persuade EPA and VC APCD that Rule 26.2 should not apply to the Cabrillo Port, including a plea for help to the White House Task Force On Energy Project Streamlining in May of 2004. BHPB's November 28 letter conveniently omits the fact that, as a result of this extensive lobbying, EPA Region 9 reversed its two year position that the Rule 26.2 requirements *do* apply to the Cabrillo Port.

The fact that VC APCD is now taking this same position does not present any due process problem since EPA has yet to issue a final air permit for the Cabrillo Port. Here, the administrative process – the issuance of a proposed permit, the opportunity for the public to comment on that proposed permit, the Agency's consideration of those comments, and the subsequent final permit – certainly contemplates that an Agency's final decision may differ from its proposed approach.¹ See, e.g., Rybachek v U.S. EPA, 904 F.2d 1276, 1288 (Ninth Cir., 1990) ("Informed changes and distinctions are the very *raison d'être* of the notice-and-comment period.") (emphasis added). BHPB has no basis to presume that the final permit will be the same as the proposed permit and by doing so, treats the entire administrative process as nothing more than an exercise to justify a pre-determined outcome.

II. VC APCD Rule 26.2 Applies To The Cabrillo Port

BHPB also attempts to discredit the legal analysis supporting VC APCD's position. However, as we explained in our August 2, 2006 comment letter regarding the proposed air permit for the Cabrillo Port, the District's position that Rule 26.2 applies to the Cabrillo Port is both supported and compelled by the DPA, the Clean Air Act, and VC APCD rules. EPA has also carefully analyzed this issue and explained that these laws require compliance with Rule 26.2 in letters to BHPB (April 5, 2004 and June 29, 2004) and to the White House Task Force on Energy Project Streamlining (July 7, 2004).²

BHPB's legal counterattack rests primarily on the erroneous premise that the District's rules broadly distinguish between onshore and offshore sources. This gross inaccuracy is used to bolster BHPB's self-serving assessment that the District is mistreating Cabrillo Port by singling it out as the only offshore source that would be required to comply with Rule 26.2. In fact, just the opposite is true.

Under VC APCD rules, *any* new emissions source in Ventura County – whether located onshore or offshore – that has the potential to emit ROC, NO_x, PM₁₀, or SO_x is required to comply with current BACT for such pollutants and to obtain offsets. VC APCD Rule 26.2. The only offshore exception to this Rule is for emissions sources

¹ EPA may also issue a new proposed permit and provide an additional opportunity for public comment if it changes course in a manner that is not a logical outgrowth of its prior proposal.

² EPA's subsequent change in position is not supported by any similar legal or factual analysis.

“located *on* San Nicolas Island or Anacapa Island.” VC APCD Rule 26.3.A.2 (emphasis added). Contrary to BHPB’s assertions, this exception does not broadly include any offshore source, but is limited to sources physically located on either Island. In addition, Outer Continental Shelf (“OCS”) sources are subject to the requirements of Rule 26.2. VC APCD Rule 26.1; Rule 26.A; 40 C.F.R. § 55.14(b)(8). BHPB contends that the Cabrillo Port is not an OCS source, and therefore OCS source regulation is not “relevant” to the regulation of the Cabrillo Port. However, the fact that Ventura County’s OCS sources are required to comply with Rule 26.2 clearly belies BHPB’s assertion that Ventura County rules treat offshore sources differently from onshore sources. Thus, it is BHPB, not the District, that is singling the Cabrillo Port out for special treatment by attempting to exempt it from the same requirements that would apply to any other new source of emissions in Ventura County.

III. Cabrillo Port Will Cause Significant Air Quality Impacts That Are Not Adequately Mitigated By BHPB’s Voluntary Measures

The District’s position that the Cabrillo Port should have to comply with Rule 26.2 is underscored by the fact that the emissions associated with the Cabrillo Port will be received in the mainland Ventura County ozone nonattainment area and will significantly increase the ozone burden in the South Central Coast (including Ventura County) and South Coast (including Los Angeles County) air basins. As discussed in our August 2 comment letter, the significant contribution of offshore source air pollutants to onshore air quality has been documented and acknowledged by EPA, the California Air Resources Board, the U.S. Congress, and multiple local air districts. BHPB does not, and cannot, dispute this fact. BHPB’s study of this issue is limited to a model that does not consider photochemical reactions and other parameters necessary to assess ozone impacts.

Compliance with Rule 26.2, including installing BACT and obtaining offsets, would ensure that the Cabrillo Port will not significantly impact these air basins and interfere with their ability to attain and maintain state and federal ozone standards. Indeed, the very point of Rule 26.2 is to ensure that the District can continue to make progress in achieving federal and State air quality standards even as new sources of emissions are introduced into the air shed.³

While strenuously objecting to the legal applicability of Rule 26.2, BHPB asserts that it “is actually doing more than” is required under Rule 26.2 because it is implementing BACT and it is “generating offsets” that will actually “improve” air quality.

³ Cabrillo Port’s compliance with VC APCD rules not only promotes air quality goals in the VC APCD, but also assists the South Coast Air Quality Management District. Under California law, an upwind air district’s air quality management plan must also account for the attainment and maintenance of state and federal air quality standards in downwind areas. Cal. Health and Safety Code § 40912. The VC APCD has incorporated standards into its air quality management plan to satisfy this obligation. See, e.g., *Ventura County Air Quality Management Plan*. 1994 (p. 2-12).

BHPB significantly overstates the value of its voluntary measures. BHPB's implementation of BACT is still in dispute, as evidenced by EPA's own letter of October 13, 2006 identifying multiple, significant questions regarding BHPB's proposed control technologies and BACT analysis.

The potential air quality benefits from the proposed tug retrofit projects are similarly overstated. BHPB's claimed emission reductions for this item are based on emissions that would occur over line haul routes that run from southern Los Angeles County through the San Francisco Bay. Contrary to BHPB's assertion, the emissions that are to be reduced in the San Francisco Bay area will have no ozone benefit in the project area. Notably, BHPB's tug retrofit project is estimated to result only in 21.31 tons per year of NO_x reductions within the VC APCD. This amount is clearly insufficient to mitigate the approximately 75 tons per year of NO_x emissions acknowledged by BHPB, much less the additional Cabrillo Port project emissions that would be generated within "federal waters" and "California Coastal Waters" off of Ventura County.

In addition, BHPB has stated that one of the tug retrofits would be the Pacific Falcon which hauls the barge Jovalan.⁴ The Jovalan transports crude oil from Santa Barbara County to refineries in the Los Angeles and San Francisco Bay areas. Any air quality benefit that would accrue to Ventura County from this measure would only be for, at most, one to two years because the Cabrillo Port would not commence operations until approximately 2012,⁵ and the marine terminal lease for the Jovalan barge will expire, at the latest, in 2013. Even if the Pacific Falcon continues to operate following expiration of the marine terminal lease, its route and duration of operation are unknown and the possible emission reductions entirely uncertain. This highlights the problem with relying on applicant developed mitigation measures instead of offsets that, in accordance with VC APCD rules, have been verified as "real, quantifiable, permanent, enforceable, and surplus."

Even accepting BHPB's claims at face value, allowing a new source to refuse to acknowledge the legal applicability of Rule 26.2 because it otherwise commits to mitigate its emissions sets a dangerous precedent for other sources in Ventura County and raises significant enforcement concerns. During the November 14, 2006 meeting of the Ventura County Air Pollution Control Board, District staff specifically noted that enforcing and monitoring BHPB's proposed mitigation measures would be difficult without requiring compliance with Rule 26.2.

Perhaps due to such concerns, the Ventura County Air Pollution Control Board voted unanimously that the District should send the November 14 letter to EPA even though it was fully informed of BHPB's commitment to implement these measures.

⁴ October 9, 2006 Letter from Thomas Wood (Stoel Rives) to Mr. Gary Yee (CARB) and Ms. Laura Yannayon Re: BHP Billiton Mitigation Report.

⁵ October 27, 2006 statements of K. Hann at U.C. Santa Barbara.

IV. Conclusion

The DPA preserves the right of the VC APCD to ensure that the Cabrillo Port will not harm its air quality. The VC APCD has exercised this right throughout the history of federal agency discussions about the licensing and permitting of the Cabrillo Port, most recently submitting a written position regarding the applicability of its own Rule 26.2. As the entity responsible for the promulgation and implementation of new source air quality requirements in Ventura County, the District speaks with authority regarding the interpretation of its own rules. EPA must give the District's submission the serious consideration it warrants as it continues forward with its permit decision for the Cabrillo Port.

Thank you for your consideration of this letter. Please contact me if you have any questions.

Sincerely,

/s/

Karen M. Kraus
Staff Attorney

cc: VC APCD Board Members
Mike Villegas, VC APCD
Dwight Sanders, State Lands Commission
Alison Dettmer, California Coastal Commission
Mark Prescott, U.S. Coast Guard
Catherine Witherspoon, California Air Resources Board